FILED
MAY 28 1992
OFFICE OF THE CLERK

(2)

No. 91-1735

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

W.M. SCHEERER,
Petitioner,

V.

ROSE STATE COLLEGE AND EEOC,
Respondent.

Petition For A Writ of Certiorari to the United States Court of Appeals For The Tenth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TED N. POOL
(Counsel of Record)
SHERRY BLANKENSHIP

POOL, THOMPSON, BLANKENSHIP
& VINCENT
511 Couch Drive, Suite 202
Oklahoma City, OK 73102
(405) 235-0484

Counsel for Respondent
Rose State College

May, 1992

QUESTIONS PRESENTED

Pursuant to Rule 24, Supreme Court Rules, Appellee/Defendant, Rose State College submits that the following question is presented for review with respect to matters involving Rose State College:

1. Did the U.S. Court of Appeals for the Tenth Circuit err in affirming the District Court's granting of Rose State College's Motion for Summary Judgment by determining that Plaintiff/Appellant's claims were untimely filed. Specifically, the U.S. District Court for the Western District of Oklahoma granted summary judgment to Defendant to Rose State College finding that Plaintiff/Appellant's Title VII claim of race discrimination was untimely filed under 42 U.S.C. §2000e-(5)(f)(1). The U.S. Court of Appeals for the Tenth Circuit affirmed this ruling, finding no "active deception" to warrant equitable tolling, citing, *inter alia, Johnson v. United States Postal Serv.*, 861 F.2d 1475, 1481 (10th Cir. 1988), *cert. denied,* 110 S.Ct. 54 (1989).

2. Citations of Opinions and Judgments Delivered in the Court Below.

Pursuant to Rule 24, citations of the opinions and judgments delivered in the courts below are presented herein:

1. In the United States Court of Appeals for the Tenth Circuit, dated December 4, 1991, No. 91-680, the Court affirmed the judgment of the United States District Court for the Western District of Oklahoma in favor of all Defendants.

2. In the United States District Court for the Western District of Oklahoma, No. CIV-90-101-B,

an Order Granting Motion for Summary Judgment was issued on April 5, 1991, rendering judgment for Rose State College.

3. Jurisdiction

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §2000e-(5)(f) and 42 U.S.C. §2000e-(5)(j), following an opinion by the U.S. Court of Appeals for the Tenth Circuit, filed December 4, 1991.

4. Applicable Statutes

The United States statutory provisions specifically applicable are contained in 42 U.S.C. §2000e-(5)(f)(1), and (j) which are set forth in their entirety in the Appendix.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. NATURE OF PROCEEDINGS	1
B. BRIEF STATEMENT OF THE FACTS	3
ARGUMENT AND AUTHORITIES	7
I. PLAINTIFF'S CLAIM BROUGHT PURSUANT TO TITLE VII IS BARRED IN ITS ENTIRETY BY THE STATUTE OF LIMITATIONS AND DEFENDANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW	8
PERCEIVED MISSTATEMENTS OF LAW AND FACT	17
CONCLUSION	20
APPENDICES	
APPENDIX A	
ORDER GRANTING MOTION FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, FILED APRIL 5, 1991	A-1
APPENDIX B	
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED DECEMBER 4, 1991	B-1
APPENDIX C	
42 U.S.C. §2000e-(5)(f)(1) and (j)	C-1
APPENDIX D	
DEPOSITION EXCERPTS OF DR. W.M. SCHEERER, TAKEN OCTOBER 3, 1990 AND OCTOBER 10, 1990	D-1

TABLE OF AUTHORITIES

Page(s)

Cases

Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147 (1984) 15, 17

Cain v. Yukon Public Sch. Dist. I-27, 775 F.2d 15 (10th Cir. 1985) 11

Carlile v. South Rautt Sch. Dist. RE 3-J, 652 F.2d 981, 985 (10th Cir. 1981) 14, 15

Clark v. Atcheson, Topeka & Santa Fe Ry., 731 F.2d 698 (10th Cir. 1984) 8, 11

Cottrell v. Newspaper Agency Corp., 590 F.2d 836 (10th Cir. 1979) 15

DeShaney v. Winnebago County DSS, 109 S.Ct. 998 (1989), 1003 fn 2 18

Dothard v. Rawlenson, 433 U.S. 321, 323, n. 1 (1977) 18

Duigan v. United States, 2740 U.S. 195, 200 (1927) 18

Johnson v. United States Postal Service, 861 F.2d 1475, 1481 (10th Cir. 1988) ..... i, 16

Martinez v. Orr, 738 F.2d 1107, 111-112 (10th Cir. 1984) 16

Melendez v. Singer-Freden Corp., 529 F.2d 321 (10th Cir. 1976) 15

Old Jordan Mining and Milling Co. v. Socrete, 16 U.S. 261, 264-265 (1986) 18

Thornton v. Coffey, 618 F.2d 686 (10th Cir. 1980) 8

Verniero v. Air Force Academy Sch. Dist. No. 20 , 705 F.2d 388 (10th Cir. 1983) 8

Youngberg v. Romeo, 457 U.S. at 316, n. 19 18

Zipes v. Transworld Airlines, Inc., 455 U.S. 385 (1982) 15

Page(s)

Statutes

28 U.S.C. §2000e-(5)(f) ii
42 U.S.C. §2000e-(5)(j) ii
42 U.S.C. §2000e-(5)(f)(1) ..... ii, 13, 14
42 U.S.C. §2000e-(5) 2

No. 91-1735

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

W.M. SCHEERER,
Petitioner,

V.

ROSE STATE COLLEGE AND EEOC,
Respondent.

Petition For A Writ of Certiorari to the United States Court of Appeals For The Tenth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Nature of Proceedings

This cause arises from allegations of racial discrimination committed by Rose State College, an Oklahoma state junior college, for failing to hire Plaintiff/Appellant for the position as Instructor/Director of the School of Nursing in 1985.

The Plaintiff filed a charge with the EEOC and the Oklahoma Human Rights Commission. In

1989, the EEOC issued a letter of "Determination," not finding acts of discrimination by Rose State College and notifying Plaintiff of her right to sue. Plaintiff then filed this suit in District Court against Rose State College and the EEOC. The College then filed a Motion for Summary Judgment as to all claims of Plaintiff which was sustained in its entirety. Plaintiff brought this Appeal to the U.S. Court of Appeals for the Tenth Circuit from the Orders of Dismissal of the EEOC and employees and the Order Granting Motion for Summary Judgment rendered April 5, 1991.

On December 4, 1991, the U.S. Court of Appeals for the Tenth Circuit issued its Opinion, affirming the rulings of the District Court on all matters. With respect to the issues involving 42 U.S.C. §2000e-(5) and Rose State College specifically before this Court, the Court determined that Plaintiff/Appellant's action was untimely filed and that there were no circumstances or facts present which would have invoked an equitable tolling of the filing deadline. To this point, the Tenth Circuit determined that the "mandatory nature of both the January 12, 1990, deadline and the time limitation on the only exception thereto was made abundantly clear by EEOC."

Plaintiff/Appellant brings this Petition for Certiorari from that Opinion, apparently confining her Petition, with respect to Rose State College, to that portion of the Opinion addressing her Title VII claim. (See "Perceived Misstatements of Law and Fact" for additional discussion of this matter).

B. Brief Statement of the Facts

Plaintiff applied for the announced position of Instructor/Director of the School of Nursing at Rose State College in January, 1985. The Nursing Program had been established in approximately 1980 by a black female who, according to Mr. Dan Points, Chairman of the Health Sciences Division, had done an excellent job and with whom they were extremely pleased. She had vacated the position for personal reasons. Plaintiff was interviewed on or about January 21, 1985, by Mr. Points, but was not hired for reasons totally unrelated to race. The College hired a woman receiving her Master of Science Degree in Nursing that Summer of 1985 with experience within the State and Junior College Higher Education system. The College offered the position to the person selected in May, 1985, and notified the Plaintiff by letter dated June 24, 1985, that another person had been formally hired for the position at the meeting of the Board of Regents on June 20, 1985. Plaintiff did not file a Charge of Discrimination until March 26, 1986.

After investigation and various correspondence, the EEOC in Oklahoma City issued a letter to Plaintiff on September 18, 1989, advising her of the reasons as reflected on the record that she was not hired, not finding discriminatory action by Defendant Rose State College, and advising her that any other information must be received within 10 days of the date of the letter. On September 24, 1989, the Oklahoma City EEOC office then sent a "Determination" letter to the Plaintiff, again not finding discriminatory action by Defendant Rose State College, stating the

reasons shown by the records that Plaintiff had not been hired, and notifying her that a Request for Review must be submitted to Washington D.C. by October 13, 1989, or that any suit must be filed by January 12, 1990, or her right to sue would be lost. The letter explicitly stated that she would receive no further notice of her right to sue. Plaintiff responded by typing her comments at the bottom of the September 18th letter and sending this document to the Washington D.C. office. The EEOC never gave Plaintiff any indication that either the October 13 or the January 12 dates had been changed or extended. Even though the EEOC letter contained notification of the October 13 deadline, the stamp of receipt by the EEOC Office indicates that the comments, typed at the bottom of the September 18, letter and sent to the Washington D.C. office, apparently intended to be a "request for review," were not received until October 27, 13 days past the deadline. The EEOC sent Plaintiff a letter to her Post Office Box mailing address, dated January 5, 1990, titled "Rejection of Untimely Request for Review (Title VII)," advising Plaintiff that her Request for Review was not submitted within the required time frame (October 13, 1989), and the request had not been accepted. The letter reiterated that the Determination letter had become final and again stated that Plaintiff must file any suit by January 12, 1990, or the right to sue would be lost.

Plaintiff filed her suit Pro Se January 17, 1990, naming Rose State College and Donald Burris, and the EEOC, as Defendants. By April 25, 1990, Plaintiff had retained an attorney who filed an Amended Petition and, on or about April

23, 1990, Plaintiff obtained permission from the Court to add Evan J. Kemp, Jr., Chairman, EEOC, as an additional party Defendant. On or about June 15, 1990, the EEOC was dismissed from this case, and on or about November 5, 1990, Evan Kemp and Donald Burris were dismissed for reasons as stated in the respective Orders of the District Court.

Plaintiff brought this action against Rose State College pursuant to Title VII of the Civil Rights Act of 1964, *42 U.S.C. §2000e-(2)(e),* and *42 U.S.C. §1981,* to secure a plaintiff's right to make and enforce contracts. Jurisdiction of the Court was invoked pursuant to the Thirteen Amendment to the United States Constitution, 42 U.S.C. §2000e(5)(f), 28 U.S.C. §1331, 28 U.S.C. §1343(3)(4), 20 U.S.C. §1681, 20 U.S.C. §1684, and pending state claims. Plaintiff also invoked the jurisdiction of the Court to secure protection of and to redress deprivation of rights secured by 42 U.S.C. §2000e, et seq., providing for injunctive and the other relief against racial, religious, national origin, and sex discrimination in employment. Plaintiff also sought declaratory relief under 28 U.S.C. §2201 and §2202, alleging that she had been discriminated against on the basis of race, by the Defendant Rose State College. The sole support of Plaintiff's Charge is based upon her assertions that the person hired for the faculty position had less education and less experience and did not even live in the vicinity.

Defendant has affirmatively and emphatically denied that it committed any acts of discrimination and further asserts that Plaintiff's charge is barred by the statute of limitations and

that Defendant is entitled to Judgment as a matter of law as to all of Plaintiff's claims for the reasons stated herein as determined by lower Courts.

Defendant, Rose State College, submitted a Motion for Summary Judgment to the District Court asserting that it was entitled to judgment as to all of Plaintiff's claims, summarily described as follows:

1. Plaintiff's §1981 claim is barred by a two year statute of limitations, pursuant to Oklahoma State Law governing injuries to rights to another not arising from contract and is not tolled by Title VII actions, and the claim is barred by the Eleventh Amendment;

2. Plaintiff's claims under 20 U.S.C. §1681 and §1684 are inapplicable on the grounds that neither sex discrimination nor blindness is an issue in this matter;

3. Plaintiff's claim under 42 U.S.C. §1982 is unavailing on the grounds that §1982 does not apply to employment discrimination cases;

4. Plaintiff's claim under Title VII is barred by the statute of limitations and because Plaintiff has failed to meet her burden of proof.

In Plaintiff's Response, she alleged that she did not receive the January 5, letter sent to her Post Office Box until 3 p.m. Friday, January 12, and could not file a Petition until the following Wednesday, January 17, because of the Monday holiday. However, she offered no evidence to indicate that the letter had only arrived at her Post Office Box on January 12, nor anything to

indicate that the EEOC had ever advised or misled her into thinking that the January 12, 1990, filing date had been extended.

On or about April 5, 1991, the District Court granted Defendant Rose State College's Motion for Summary Judgment for the reasons summarized as follows:

1. Plaintiff's claims under §1981 and §1982 are time barred.

2. Plaintiff wholly failed to respond to Defendant's arguments regarding Plaintiff's claims brought pursuant to 20 U.S.C. §1681 and §1684 and these claims are therefore deemed waived or abandoned by Plaintiff.

3. Plaintiff's claim brought pursuant to Title VII is time barred and no grounds were presented by Plaintiff to invoke equitable tolling.

Plaintiff brought this Appeal to the U.S. Court of Appeals for the Tenth Circuit, with respect to Rose State College, from the District Court Order granting Motion for Summary Judgment. The U.S. Court of Appeals for the Tenth Circuit affirmed the ruling of the District Court on December 14, 1991, and Plaintiff/Appellant has brought this Petition for Certiorari from that ruling.

Following the Order granting Defendant's Motion for Summary Judgment, Plaintiff's attorney filed a Motion to Withdraw as Attorney of Record for Plaintiff. This Motion was granted and Plaintiff/Appellant has brought her Appeals Pro Se.

ARGUMENT AND AUTHORITIES

I. PLAINTIFF'S CLAIM BROUGHT PURSUANT TO TITLE VII IS BARRED IN ITS ENTIRETY BY THE STATUTE OF LIMITATIONS AND DEFENDANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW AS DETERMINED BY THE COURTS BELOW AND THIS PETITION FOR CERTIORARI SHOULD BE DENIED.

Although the Standard of Review in Title VII cases has been determined to be governed by the "clearly erroneous" rule (*Verniero v. Air Force Academy Sch. Dist. No. 20,* 705 F.2d 388 (10th Cir. 1983); *Thorton v. Coffey,* 618 F.2d 686 (10th Cir. 1980), this case was decided by the District Court pursuant to Fed. R. Civ. P. 56, upon Defendant Rose State College's Motion for Summary Judgment. Pursuant to *Clark v. Atcheson, Topeka & Santa Fe Ry. Co.,* 731 F.2d 698 (10th Cir. 1984), the standard of review before the Tenth Circuit is therefore the same as that of the District Court; i.e., a determination of whether any genuine issue of material fact exists and whether the substantive law was correctly applied.

The Defendant, Rose State College, is an Oklahoma educational institution, governed and controlled by the State of Oklahoma. Plaintiff applied for the position of Instructor/Director of Nursing in the Health Science Division of Rose State College, in January, 1985, pursuant to an advertisement for the published position as set forth in the Brief in Support of Motion for Summary Judgment (R. Doc. 37 at Ex. 1 and 2). Plaintiff was not hired for this position, as set forth in the letter from the Defendant to Plaintiff dated

June 24, 1985. (R. Doc. 37 at Ex. 3). Plaintiff filed a charge with the EEOC and the Oklahoma Human Rights Commission on or about March 26, 1986 alleging that she was denied employment because of her race. (R. Doc. 37 at Ex. 4). The EEOC issued a Notice of Right to Sue dated June 6, 1989, which states that the Plaintiff must file suit within 90 days from receipt of the Notice or the right to sue is lost. The EEOC indicated that the Right to Sue letter was being issued because Plaintiff's Charge was untimely filed with the Commission. (R. Doc. 37 at Ex. 5). In a letter dated June 9, 1989, Plaintiff wrote Donald Burris, Area Director of the EEOC, acknowledging receipt of the Notice of the Right to Sue and "rejecting" the dismissal of the Charge. (R. Doc. 37 at Ex. 6). In a letter dated August 24, 1989, Jacklyn Bradley, District Director of the EEOC wrote Scheerer granting a request for the reopening of the Charge for the limited purpose of gathering information regarding the timeliness of the Charge. (R. Doc. 37 at Ex. 7). However, the EEOC reviewed the merits of the charge, and in a letter dated September 18, 1989, Donald Burris, EEOC Director, wrote Scheerer setting out his analysis of the matter and finding no discrimination committed by Rose State College. (R. Doc. 37 at Ex. 8). On September 24, 1989, Donald Burris again wrote Dr. Scheerer a document titled "Determination," again finding no discrimination committed by Rose State College and advising Dr. Scheerer of the procedures to be followed if she wished to have the determination reviewed. (R. Doc. 37 at Ex. 9). The document states in pertinent part:

If the Charging Party wishes to have this Determination reviewed, she must submit a signed letter to the Determination Review Program which clearly sets forth the reason for requesting the review and which lists the Charge Number and respondents name. Charging Party must also attach a copy of this Determination to her letter.

These documents must be personally delivered or mailed (post marked) on or before *October 13, 1989,* to the Determinations Review Program, Office of Program Operations Equal Employment Opportunity Commission, 1801 L Street, Northwest Washington D.C. 20507. It is recommended that some proof of mailing such as certified mail receipt be secured.

The document also states:

If the Charging Party does not request a review of this determination by October 13, 1989, this determination will become final the following day, the processing of this charge will be complete, and the charge will be dismissed. (This letter will be the only notice of dismissal and the only notice of the Charging Party's right to sue sent by the Commission.) FOLLOWING DISMISSAL, THE CHARGING PARTY MAY ONLY PURSUE THIS MATTER FURTHER BY FILING SUIT AGAINST THE RESPONDENT(S) NAMED IN THE CHARGE IN FEDERAL DISTRICT COURT WITHIN 90 DAYS OF THE EFFECTIVE DATE OF DISMISSAL. Therefore, in the event a request for review is not made, if a suit is not filed by January 12, 1990, the Charging Party's right to sue will be lost. The Commission's regulations governing

no cause determinations are printed in Title 29, Code of Federal Regulations, Section 1601.19.

Plaintiff then typed a letter at the bottom of the second page of the September 18, 1989, letter received from Dr. Burris, addressed the letter to the Administrator of the Determinations Review Program, and sent that to the Washington D.C. Office. The "Received" stamp from the Determinations Review Program on the document indicates that it was received October 27, 1989, 14 days past the October 13, deadline. (Defendant would advise the Court that the hand written comments contained on this document were on the document furnished to Defendant by the EEOC Office).

Plaintiff now seems to assert, on page 6, that she submitted her request for review in July and it was, therefore, timely. This position must fail for the following reasons: 1) This argument is brought for the first time on appeal and must be rejected on that ground alone. *Cain v. Yukon Public Sch. Dist. I-27*, 775 F.2d 15 (10th Cir. 1985); *Clark v. Atcheson, Topeka & Santa Fe Ry. Co.*, 731 F.2d 698 (10th Cir. 1984). 2) The "Notice of Right to Sue" to which Plaintiff refers (R. Doc. 37 at Ex. 5) was issued June 6, 1989. Plaintiff responded to this letter by writing Burris, EEOC Oklahoma City, to "reject [his] dismissal of [her] charge." (R. Doc. at Ex. 6) The Charge was reopened for the stated "limited purpose of reviewing the timeliness" of the charge. However, the entire matter was subsequently reviewed (R. Doc. 37 at Ex. 7). The previously referenced letters of September 18, and September 24 represented closure in this matter by the EEOC. This argument is spurious

and unavailing. The District Court did not base its ruling upon the June 6 Right to Sue letter. The EEOC had already extended Plaintiff's time from September (90 days from June 6) to January 12.

In her Appellant's Brief, Plaintiff asserts that the lower Courts relied upon "flawed" evidence. In her Brief to the Tenth Circuit, Plaintiff asserted that a letter was "mistakenly identified" and refers to a "flawed" deposition (apparently referring to her own deposition). If Plaintiff is referring to the "Determination" letter of September 24, 1989, then Defendant Rose State College would advise the Court that Plaintiff stipulated to the issuance of the September 24 "Determination" letter in the two Joint Status Reports, filed September 24, 1990 and January 3, 1991, with the District Court (R. Docs. 30 and 34; Part II, Stipulations, Para. 6). Additionally, in her "Brief in Support of the Objection to Defendant Rose State College Motion for Summary Judgment," (R. Doc. 37, p.3-4, Para. 13 and 14), Plaintiff states that she responded to the "Determination" letter by typing on the bottom of the September 18, letter. In that response, Plaintiff also states that the "Determination" letter required that a request for review " 'be personally delivered or mailed, post marked' " on or before October 13, 1989. Plaintiff cannot now attempt to state that this letter was "mistakenly identified" or that "flawed evidence" was introduced or that any deception was practiced before the Court by Rose State College.[1] Michael Doughtery, Acting

---

[1] For purposes of additional clarity, Defendant would advise this Court that Plaintiff identified this Document during her Deposition (Scheerer, October 13, Depo. p. 65, ll.12-25; pp. 66 ll.1-8; p. 71 ll.5-25; p. 72, ll.1-25) stating that she

Director of the Determinations Review Program, sent Plaintiff a document titled "Rejection of Untimely Request for Review (Title VII)," dated January 5, 1990, (R. Doc. 37 at Ex. 10) stating that the Request for Review was not mailed within the designated time frame and the letter of Determination had become the final action of the Commission. That document also restated the January 12, 1990, filing deadline date. (90 days from the October 12 deadline); (See 42 U.S.C. §2000e-(5)(f)(1)). There was no other written correspondence between Plaintiff and the EEOC between September and January. Plaintiff then filed this action January 17, 1990, five days past the filing deadline.

Plaintiff's action is untimely because Plaintiff failed to file the action within the time frame as set forth in the September 24, 1989, Determination letter sent by Mr. Burris which clearly states that any lawsuit must be filed by January 12, 1990, and that any request for review must be made by October 13, 1989. Plaintiff received nothing from the EEOC which would indicate that the filing date of January 12, 1990, had been extended. Even if her typewritten note at the bottom of the September 18, letter which was sent to the Washington D.C. Office could be considered a "request for review," it was not received by the Washington Office until October 27,

---

had received the September 24 Determination letter and had written her response on the bottom of the September 18, 1989, letter. The Deposition was then continued until the following week. At that time, the Plaintiff contradicted her earlier testimony by stating that she had not received the "Determination" letter. (Depo. Scheerer, Oct. 10, 1990, p. 37, ll.5-25; p. 38, ll.1-25; p. 39, ll.1-2). Excerpts from the Plaintiff's Deposition containing this contradictory testimony were presented to the Tenth Circuit, in full disclosure by Rose State College, and are presented here as Appendix D as an aid to this Court.

1989, approximately two weeks after the October 13, deadline for review had passed. Plaintiff said that she received the January 5, 1990, rejection of the Request for Review on January 12, 1990, and filed the suit on January 17, as soon as possible. This statement is a misrepresentation of the facts. That notification merely reiterated the January 12, 1990, filing deadline of which she had been previously notified in September. (See 42 U.S.C. §2000e-5(f)(1)).

The Plaintiff argued that the finality of the Determination letter was improper and that she was misled into thinking that the deadline for filing suit had been extended. However, Plaintiff cited no authority for her assertions that the Determination letter was improper. Defendant/Appellant Rose State College asserts that the referenced letter fulfills the requirements of notice set forth in 42 U.S.C. §2000e-5(f)(1) which states, in pertinent part, that if the commission has not filed a charge, then the commission "shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent." Such notice is explicitly contained in the document. The District Court addressed the issue involving the alleged impropriety of the EEOC's actions and correctly determined that Plaintiff had offered no support for the assertion that the actions of the EEOC involving the Determination letter were improper, and, absent such authority, the District Court would not reach such a conclusion. The District Court then determined that the 90 day filing period is not jurisdictional. With respect to equitable tolling, and in accordance with the Court's determination in *Carlile v. South*

Routt Sch. Dist. RE 3-J, 652 F.2d 981, 985 (10th Cir. 1981), the District Court also determined that "[e]quitable tolling is appropriate only where the circumstances of the case rise to a level of active deception, sufficient to invoke the powers of equity," citing *Zipes v. Transworld Airlines, Inc.*, 455 U.S. 385 (1982) and *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147 (1984). (R. Doc. 50 at p.11).

In Plaintiff's case the Determination letter clearly stated that Plaintiff must request a review of the Determination by October 13, 1989, or file suit by January 12, 1990. The letter also states that "This letter will be the only notice of dismissal and the only notice of the charging party's right to sue sent by the Commission." As the District Court correctly determined, Plaintiff neither submitted her request for review nor did she file suit in a timely manner. The EEOC did nothing to lull Plaintiff into inaction or lead her to believe that either of these deadlines had been extended. Plaintiff had been clearly advised of the consequences if these deadlines were not met and notice that she had failed to comply was unnecessary. The notice and deadlines were clear and Plaintiff failed to abide by them. Equitable tolling is not justified, and the ruling of the District Court should be affirmed. *Melendez v. Singer – Freden Corp.*, 529 F.2d 321 (10th Cir. 1976); *Cottrell v. Newspaper Agency Corp.*, 590 F.2d 836 (10th Cir. 1979).

Plaintiff offers no evidence to support her contentions that she mailed the request for review on or before October 13. She cannot remember the date even though the Determination let-

ter explicitly advises the charging party to obtain proof of mailing. Plaintiff had no reason to assume that a belated request for review would toll explicit deadlines.

The Court of Appeals for the Tenth Circuit affirmed the ruling of the District Court, concluding that the circumstances of this case did not warrant equitable tolling. Citing *Johnson v. U.S. Postal Service*, 861 F.2d 1475, 1481 (10th Cir. 1988), *cert. denied*, 110 S.Ct. §54 (1989), the Court determined that the filing deadline was made "abundantly clear by EEOC," that there was neither "active deception nor any of the misleading ambiguity it deemed sufficient to warrant equitable tolling in *Martinez v. Orr*, 738 F.2d 1107, 111-12 (10th Cir. 1984)."

Plaintiff has offered nothing to support the invocation of equitable tolling in this matter. She states that she did not receive the January 5 letter until January 12 afternoon. She also alleges that the letter was "double postmarked" January 8 and 9 and "manipulated" to reach her on the 12th. However, Plaintiff offers no evidence to support these assertions at all. Nor does Plaintiff assert that she visited the post office box before 3:00 in the afternoon of January 12, and the letter was not in the box. As a post office box patron, Plaintiff would not know that she had received any mail until she actually retrieved it from the postal box site which can be at any time. Even if these assertions were so, it would not alter the situation. The January 12 letter merely reiterated the filing date which had been given Plaintiff in September and had never been changed.

Plaintiff offers nothing to suggest that she was misled into thinking that the deadline had been extended. There is no deception in this case. Plaintiff has asserted nothing to meet any criteria so as to justify equitable tolling in this matter. The District Court and the Appellate Court correctly determined that there are no circumstances or action on the part of EEOC or Defendant College which could constitute a sufficient ground for equitable tolling. The rulings of the District Court and the Tenth Circuit should be affirmed and Plaintiff's Petition for Certiorari should be denied.

Equitable tolling is not appropriate in the instant case, in accordance with the referenced cases and the determination by the U.S. Supreme Court in *Baldwin Co. Welcome Center v. Brown*, 466 U.S. 147, 80 L.Ed 2d 196, 202, 104 S.Ct. 1723 (1984) that "one who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."

PERCEIVED MISSTATEMENTS OF LAW AND FACT

Plaintiff's Petition, as were her Briefs to the Tenth Circuit, is replete with matters not presented to the District Court and accusations of wrongdoing by counsel for Rose State College and by her own counsel before his withdrawal. These accusations are totally without basis or merit. Rose State College has attempted to confine its response to the issues properly before this Court and will not respond further to these "new issues" and false allegations unless so instructed by this Court, except to affirmatively state that there has been no fraud, conspiracy,

theft, deception or any other improper action whatsoever presented or practiced before this Court, the U.S. Court of Appeals for the Tenth Circuit, or the U.S. District Court for the Western District of Oklahoma. Appellant's arguments appear primarily to relate to her dissatisfaction with the decision of the District Court and that of the Tenth Circuit, her dissatisfaction with opposing Counsel and her own Counsel, her misunderstanding of the discovery process, and to her attempt to litigate the merits of the hiring decision of Rose State College *de novo* in an appellate court. These matters are irrelevant to the holding of both lower courts that this cause was untimely filed and to a consideration of whether the Petition for Certiorari should be granted. Appellant includes numerous factual matters and assertions not previously presented to the District Court and with which Rose State College would affirmatively disagree. However, matters which are presented first on appeal in an attempt to supplement the case and which were not introduced in the proceedings below cannot be considered by the Court on appellate proceedings. *DeShaney v. Winnebago County DSS*, 109 S.Ct. 998 (1989), 1003, fn 2, citing *Youngberg v. Romeo*, 457 U.S., at 316 n. 19, 120 S.Ct., at 2458, n. 19; *Dothard v. Rawlenson*, 433 U.S. 321, 323, n.1, 97 S.Ct. 2720, 2724, n. 1 53 L.Ed.2d 786 (1977); *Duigan v. United States*, 2740 U.S. 195, 200, 47 S.Ct. 566, 568, 71 L.Ed. 996 (1927); *Old Jordan Mining and Milling Co. v. Socrete Anonyme des Mines*, 16 U.S. 261, 264-265, 17 S.Ct. 113, 114-115, 41 L.Ed. 427 (1986). Rose State College respectfully requests that this extraneous information be disregarded and stricken. (Fed. R. Civ. P. 24 (.6)).

BEST AVAILABLE COPY

Rose State College would also advise this Court that the decision of the Tenth Circuit as included in the Appendix sent to the College by Plaintiff attached to the third Petition is incorrectly presented. Specifically, those pages numbered 5 and 6 are not a part of the Tenth Circuit Opinion (Rose State College has determined that these pages are from the Opinion of the District Court) and portions of the Tenth Circuit Opinion have been omitted (i.e., a portion of subsection titled "Dismissal of EEOC;" all of "Dismissal of Individual EEOC Defendants;" the first portion of "Summary Judgment for Rose State College;" note 2; and a portion of note 3). The College does not know if this error exists in copies filed with the Court.

CONCLUSION

The Petition for Certiorari is devoid of any facts or authorities to demonstrate that the decision of the U.S. Court of Appeals for the Tenth Circuit is contrary to existing authority or that it has departed from the accepted and usual course of judicial proceedings, or sanctioned such departure by a lower Court, or resolved a matter of new impression which should be settled by this Court. The Petition for Certiorari is without merit and Rose State College respectfully requests that the Court decline to grant said Petition.

Respectfully submitted,

TED N. POOL
(Counsel of Record)
SHERRY BLANKENSHIP

—Of the Firm—
POOL, THOMPSON, BLANKENSHIP
& VINCENT
511 Couch Drive, Suite 202
Oklahoma City, OK 73102
(405) 235-0484

Attorneys for Respondent

May, 1992

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-90-101-B

W.M. SCHEERER,
Plaintiff,

vs.

ROSE STATE COLLEGE,
Defendant.

[Filed Apr. 5, 1991]

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Before the court is the motion for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure filed by the Defendant, Rose State College, on March 8, 1991. Plaintiff's response was filed on March 25, 1991. The issues have been fully briefed and are ripe for determination. After careful review of the motion, supporting brief and attached exhibits as well as Plaintiff's response and attached exhibits, the court finds that Defendant's motion for summary judgment should be granted as to each of Plaintiff's claims.

Plaintiff, Wynelle Scheerer's, complaint results from Defendant's failure to hire Plaintiff as Director of Nursing, a decision which Plaintiff claims was based on discriminatory hiring practices. This court's jurisdiction is invoked under 28 U.S.C. §1331, 28 U.S.C. §1343(3) and (4) and 28 U.S.C. §§ 2201 and 2202. Plaintiff brings her action under Title VII, 42 U.S.C. §2000e, as amended, as well as 42 U.S.C. §§ 1981 and 1982, and 20 U.S.C. §§ 1681 and 1684. Defendant's motion for summary judgment addresses each of these claims.

Standard of Review

The standard for granting summary judgment is expressed in Rule 56 of the Federal Rules of Civil Procedure. This rule provides that judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). When a motion for summary judgment is made, the party opposing the motion may not rest on the pleadings or on mere allegations or denials, but "must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 56(e). The adverse party must present sufficient evidence that his claim has merit. *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985). On a summary judgment motion, the court is required to pierce the pleadings and evaluate the actual proof to determine whether summary judgment is appropriate. Fed.R.Civ.P. 56 (Advisory Committee Notes).

I. 20 U.S.C. §§ 1681 and 1684 Claims

As a preliminary matter, Plaintiff has wholly failed to address Defendant's argument with respect to her claims brought pursuant to 20 U.S.C. §§ 1681 and 1684. Therefore, the court deems Plaintiff to have waived or abandoned those claims. Defendant's motion for summary judgment is granted as to those claims arising under 20 U.S.C. §§ 1681 and 1684.

II. 42 U.S.C. §§ 1981 and 1982 Claims

Second, a review of the record in this case reveals that Plaintiff's claims under 42 U.S.C. §§ 1981 and 1982 are clearly brought outside the applicable statute of limitations with respect to these particular civil rights statutes. Federal civil rights statutes do not specify a statute of limitations for section 1981 and section 1982 actions. Therefore, courts have been

uniformly clear in stating that a federal court should adopt the most analogous state statute of limitations. *Wilson v. Garcia*, 471 U.S. 261 (1985). The characterization of an action for purposes of selecting the appropriate state statute is ultimately a question of federal law. *International Union, United Auto, Aerospace & Agr. Impl. Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). In the *Garcia* case, the Supreme Court ruled that section 1983 claims are best characterized as personal injury actions for purposes of selecting the most appropriate state statute of limitations. The Supreme Court has further found that the *Garcia* rationale is equally applicable to claims brought under 1981 since all section 1981 claims are in essence actions for injury to personal rights. *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987). *See also E.E.O.C. v. Gaddis*, 733 F.2d 1373 (10th Cir. 1984). Likewise, actions brought pursuant to section 1982 are best characterized as personal injury actions. *See Goodman*, 482 U.S. at 660-61 (sections 1981, 1982 and 1983 are all "part of a federal law barring racial discrimination, which . . . is a fundamental injury to the individual rights of a person."). Under these holdings, the most analogous Oklahoma statute is the two-year limitations period for injury to the rights of another. *See* Okla. Stat. tit. 12, §95.

Further, Oklahoma law is clear with respect to the accrual of causes of action for claims for injury to the rights of another. Generally, the statute of limitations begins to run when the cause of action accrues, and the test for determining when the cause of action accrues is to ascertain the time when the plaintiff could first maintain her action. *Knudson v. Weeks*, 394 F.Supp. 963 (W.D. Okla. 1975).

In the present case, the court finds that Plaintiff's claim accrued when she was informed that the employment decision had been made and she was not hired. As will be discussed in greater detail *infra.*,

Plaintiff had knowledge that she was not hired for the position in May or June, 1985.[1] The record reflects that Plaintiff's complaint was filed on January 17, 1990, well outside the two-year limitations period.

Moreover, the law is equally clear that filing an administrative claim under Title VII does not toll the statute of limitations on an action brought pursuant to sections 1981 and 1982 concerning equal rights under the law. *Page v. U.S. Indus., Inc.*, 556 F.2d 346 (5th Cir. 1977). The court concludes, therefore, that Plaintiff's claims brought under 42 U.S.C. §§ 1981 and 1982 are time-barred. Consequently, those claims should be dismissed.

III. Title VII Claim

Next, the court addresses Plaintiff's Title VII claim for race discrimination and the effect of the statutory limitations period on her claim. For purposes of analyzing these issues, the court finds the following facts are uncontroverted by the evidence.

On January 5, 1985, Plaintiff responded to an advertisement soliciting resumes for the position of Director of Nursing at Rose State College. She reapplied for the position on May 2, 1985. Plaintiff was notified by letter dated June 24, 1985, and mailed to Plaintiff's address that she was not hired for the position.[2]

---

[1] The precise date is not particularly relevant to the present discussion as it will be when the court addresses the limitations period under Title VII.

[2] Plaintiff testified in deposition that she telephoned a representative of the Defendant and was told that someone else had been hired for the position. This conversation occurred somewhere between the date the successful applicant began her employment, the last week in May, 1985, and the date that Plaintiff received the June 24, 1985 letter. There is no evidence, however, with respect to when this occurred. Plaintiff merely testified that she had spoken with someone at the college, but she was unable to recall when that conversation took place. Defendant offers no further evidence on this point.

Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on March 26, 1986. The EEOC referred Plaintiff's charge to the Oklahoma Human Rights Commission on April 11, 1986. The state agency indicated that it did not intend to initially process the charge and deferred to the EEOC on April 23, 1986.

The EEOC issued a dismissal and notice of right to sue on June 6, 1989. The EEOC determined that Plaintiff's claim was untimely filed, and therefore, the Commission had no authority to investigate her claim. By letter dated June 9, 1989, Plaintiff informed Donald Burris, Oklahoma City Area Director of the EEOC, that she "rejected" the dismissal of her charge. On August 24, 1989, the District Director of the EEOC notified Plaintiff that her charge was to be reopened for the "limited purpose of acquiring more information on the timeliness of the charge." Defendant's Ex. 7 attached to its brief in support of its motion for summary judgment. However, by letter dated September 18, 1989, Donald Burris addressed the merits of Plaintiff's charge rather than the timeliness issue for which the charge had been reopened. His determination was that there had been no racially discriminatory motive in rejecting Plaintiff for the Director's position. On September 24, 1989, Mr. Burris sent a letter entitled "DETERMINATION" to Plaintiff informing her that her charge had no merit. It further informed her that she could request a review of his determination if she did so before October 13, 1989. The significant language provides:

> This determination does not conclude the processing of this charge. If the Charging Party wishes to have this determination reviewed, she must submit a signed letter to the Determinations Review Program which clearly sets forth the reasons for requesting the review and which lists the Charge

Number and Respondent's name. Charging Party must also attach a copy of this Determination to her letter.

These documents must be PERSONALLY DELIVERED OR MAILED (POSTMARKED) ON OR BEFORE OCTOBER 13, 1989 to the Determinations Review Program . . . IT IS RECOMMENDED THAT SOME PROOF OF MAILING, SUCH AS A CERTIFIED MAIL RECEIPT, BE SECURED.

If the Charging Party submits a request by the date shown above, the Commission will review the determination. Upon completion of the review, the Charging Party and Respondent will be issued a final determination which will contain the results of the review and what further action, if any, the Commission may take. The final determination will also give notice, as appropriate, of the Charging Party's right to sue.

If the Charging Party does not request a determination by October 13, 1989, this determination will become final the following day, the processing of this charge will be complete, and the charge will be dismissed. (This letter will be the only notice of dismissal and the only notice of the Charging Party's right to sue sent by the Commission." FOLLOWING DISMISSAL, THE CHARGING PARTY MAY ONLY PURSUE THIS MATTER FURTHER BY FILING SUIT AGAINST THE RESPONDENT(S) NAMED IN THE CHARGE IN FEDERAL DISTRICT COURT WITHIN 90 DAYS OF THE EFFECTIVE DATE OF DISMISSAL. Therefore, in the event a request for review is not made, if a suit is not filed by January 12, 1990, the Charging Party's right to sue will be lost.

Defendant's Ex. 9 attached to its brief in support of its motion for summary judgment (emphasis in second paragraph added).

Plaintiff typed a response to Mr. Burris' letter on the bottom of the September 18, 1989, letter and sent it to the Determinations Review Program in Washing-

ton, D.C., where it was received on October 27, 1990.[3] Defendant's Ex. 8 attached to its brief in support of its motion for summary judgment. On January 5, 1990, the Acting Director of the Determinations Review Program notified Plaintiff that her request for review was untimely. It further stated:

> [Y]our request is not accepted and the Letter of Determination issued to you by our field office has become the final determination of the Commission. The Commission's administrative processing of your charge has been terminated.
>
> Should you wish to pursue this matter further, you may do so by filing suit under Title VII in Federal District Court against the Respondent(s) named above. Any such suit must be filed within 90 days of the effective date of dismissal, as discussed in the Letter of Determination. Therefore, if a suit is not filed by January 12, 1990, your Right to Sue will be lost.

Defendant's Ex. 10 attached to its brief in support of its motion for summary judgment. Plaintiff testified she received the Review Program's rejection on January 12, 1990. Plaintiff's complaint in the present case was filed on January 17, 1990.

Defendant argues that Plaintiff's Title VII is barred by the statute of limitations for either of two reasons. First, it alleges that Plaintiff's charge of discrimination was filed outside the 300-day period for filing under 42 U.S.C. §2000e-5(e). The statute provides as a general rule that a complainant must file a discrimination charge with the EEOC within 180 days of the occurrence of the alleged unlawful employment practice. *Id.* If a complainant initially institutes proceedings with a state or local agency

---

[3]Plaintiff's counsel argues that Plaintiff "contends that she filed her request [for review of determination] on or before the 1st day, of October, 1989." Plaintiff's brief in support of the objection to motion for summary judgment at 4. However, the record is devoid of any evidence relative to this contention.

with authority to grant or seek relief from the practice charged, the time limit for filing with the EEOC is extended to 300 days. *Id.* The Act further provides that no charge may be filed with the EEOC until 60 days have elapsed from initial filing of the charge with an authorized state or local agency, unless that agency's proceedings "have been earlier terminated." 42 U.S.C. §2000e-5(c). Because of the 60-day referral period, a complainant must file a charge with the appropriate state agency, or have the EEOC refer the charge to that agency, within 240 days of the alleged discriminatory act in order to ensure that it may be filed with the EEOC within the 300-day limit. *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980). If the complainant does not file within 240 days, the charge may still be timely filed with the EEOC if the state agency terminates its proceedings before 300 days. *Id.* "Termination" of state proceedings has been held to include a waiver of a right to initially process a charge of discrimination. *See E.E.O.C. v. Commercial Office Prods. Co.*, 486 U.S. 107 (1988).

In the present case, Oklahoma has a work-sharing agreement with the EEOC. Thus, provided Plaintiff is able to meet the 300-day requirement as outlined above, her charge of discrimination was timely filed.

The limitations period for filing a claim with the EEOC begins to run on the date the plaintiff receives notice of the allegedly discriminatory act, not the date the decision actually takes effect. *Tadros v. Coleman*, 717 F. Supp. 996 (S.D. N.Y. 1989) *affirmed*, 898 F.2d 10 (2nd Cir. 1990). If there is some question concerning when plaintiff received notice, the limitations period begins to run from the time the plaintiff knows or reasonably should know that the act occurred. *McWilliams v. Escambia County School Bd.*, 658 F.2d 326 (5th Cir. 1981).

Here, the evidence indicates that notice was sent to Plaintiff on June 24, 1985. However, in her deposi-

tion, Plaintiff denied ever having received such notification although it was sent to her correct address. *See* Defendant's Ex. 16 attached to its brief in support of motion for summary judgment. Plaintiff further admitted that, even though she did not recall seeing the June 24, 1985, letter, she was told on the phone that the position had been filled. But she does not remember when this conversation took place. *Id.* Since the evidence is such that a precise date for the telephone conversation cannot be fixed, the only evidence on this issue is the June 24, 1985, letter. Allowing three days for time in the mail, the date on which the 300-day period begins to run is June 27, 1985. Three hundred days from June 27, 1985 is April 24, 1986.

The evidence in this case shows that the Oklahoma Human Rights Commission deferred processing of Plaintiff's initial charge and notified EEOC of such on April 23, 1986, the 299th day. The court therefore finds that Plaintiff's charge was indeed filed within the statutory period.

Defendant next argues that Plaintiff filed her complaint in this court outside the EEOC-imposed January 12, 1990, filing date set forth in the EEOC determination letter; consequently, her Title VII is time-barred. The record indeed reflects that Plaintiff's complaint was filed on January 17, 1990. Plaintiff, in turn, argues that equitable tolling should apply to toll the period for filing for two reasons. First, she urges that the finality of the determination letter which was contingent upon her request for review from the Determinations Review Program was improper. Second, she argues that she was misled into thinking the determination was being reviewed until January 12, 1990, when she received notice from the Determinations Review Program that her review was rejected for having been filed untimely.

The United States Supreme Court has recognized that limitations period for actions brought under Title VII are not jurisdictional and may be subject to equitable tolling. *Zipes v. Transworld Airlines Inc.*, 455 U.S. 385 (1982). Equitable tolling is appropriate only where the circumstances of the case rise to a level of active deception, sufficient to invoke the powers of equity. For instance, equitable tolling may be appropriate under the following circumstances:

1. plaintiff has received inadequate notice;
2. a motion for appointment of counsel is pending;
3. the court has led the plaintiff to believe that she had done everything required of her;
4. affirmative misconduct on the part of a defendant lulled the plaintiff in inaction.

See Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147 (1984).

Addressing Plaintiff's first argument, the court finds her position unpersuasive. Plaintiff offers no case law or other argument in support of her position. Absent an argument based either on law or public policy, the court is unwilling to conclude that the EEOC's actions in this case were improper.

Moreover, the court determines that the September 24, 1989, letter to Plaintiff very clearly stated her further responsibilities. She was required to either request review by letter delivered or postmarked by October 13, 1989, or file suit by January 12, 1990. Plaintiff did neither. Therefore, the court fails to see how Plaintiff could have been misled by the review program's actions. A review of the record reveals no circumstance or action on the part of EEOC or Defendant which could constitute a sufficient ground for equitable tolling. Accordingly, Plaintiff's Title VII claim should be dismissed. As there are no remaining claims, this action should be dismissed in its entirety.

WHEREFORE, IT IS ORDERED that Defendant, Rose State College's, motion for summary judgment is GRANTED, and this action is DISMISSED in its entirety. Accordingly, the trial date currently set for April 8, 1991 is hereby stricken.

Dated this 5th day of April, 1990.

UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET
ON 4-5-91

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 91-6180

W.M. SCHEERER,
Plaintiff-Appellant

v.

ROSE STATE COLLEGE; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; DONALD BURRIS; AND EVAN KEMP,
Defendants-Appellees.

[Filed Dec. 4, 1991]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (D.C. No. 90-CV-101-B)

Submitted on the briefs:

W.M. Scheerer, pro se.

Sherry Blankenship and Ted N. Pool of Pool, Thompson, Coldiron Blankenship & Vincent, Oklahoma, City, Oklahoma, for Defendant-Appellee Rose State College.

Donald R. Livingston, Acting General Counsel, Gwendolyn Young Reams, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, and Lamont N. White, Attorney, Equal Employment Opportunity Commission, Washington, D.C., for Defendants-Appellees Equal Employment Opportunity Commission, Donald Burris, and Evan J. Kemp, Jr.

Before ANDERSON, BARRETT, and BRORBY, Circuit Judges.

BARRETT, Senior Circuit Judge.

Plaintiff appeals[1] from an adverse judgment of the district court, which in three separate orders granted a Motion to Dismiss filed by Defendant Equal Employment Opportunity Commission (EEOC), another such motion filed by Defendants Donald Burris and Evan Kemp (individual EEOC Defendants), and a Motion for Summary Judgment filed by Defendant Rose State College (RSC). Plaintiff brought this action under various civil rights statutes to redress an alleged discriminatory hiring practice by RSC and an alleged discriminatory failure by EEOC properly to investigate and pursue her claim against RSC.

Dismissal of EEOC

In its Motion to Dismiss, EEOC argued that Congress has not authorized, either expressly or impliedly, a cause of action directly against the EEOC for misprocessing of claims asserted against third-party employers. R. Vol. I, docs. 4 and 5. This motion was renewed when Plaintiff, then represented by counsel, amended her complaint. R. Vol. I, doc. 13. Plaintiff never responded to the motion. Consequently, the district court did not reach the merits of the motion, but rather granted it on the basis of W.D. Okla. R. 14(A), pursuant to which an unanswered motion may be deemed confessed. R. Vol. I, doc. 14 (Order granting EEOC'S Motion to Dismiss); *see also* R. Vol. I, doc. 19 (Order denying Plaintiff's Motion to Reconsider Dismissal of EEOC.)

---

[1]After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

In light of the circumstances surrounding the timing, service, and reassertion of EEOC's motion,[2] *see* R. Vol. I, doc. 16 (Plaintiff's Memorandum Brief in Support of Motion to Reconsider dismissal of EEOC), there is a serious question whether the district court's purely procedural disposition could be upheld in view of several recent opinions of this circuit reversing similar rulings in roughly comparable settings as unduly drastic. *See, e.g., Miller v. Department of Treasury*, 934 F.2d 1161, 1162 (10th Cir. 1991); *Hancock v. City of Okla. City*, 857 F.2d 1394, 1396 (10th Cir. 1988); *Meade v. Grubbs*, 841 F.2d 1512, 1519-22 (10th Cir. 1988). We need not resolve the matter, however, as we conclude that dismissal of Plaintiff's claim is appropriate on the substantive legal basis asserted in EEOC's motion. *See generally Griess v. Colorado*, 841 F.2d 1042, 1047 (10th Cir. 1988) (court of appeals is "free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court") (quoting *Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 887 (2d Cir. 1987)).

"The circuits which have addressed the issue have uniformly held that no cause of action against the EEOC exists for challenges to its processing of a claim." *Peavy v. Polytechnic Inst.*, 749 F. Supp. 58, 58 (E.D.N.Y 1990), *aff'd*, 940 F.2d 648 (2d Cir. 1991); *see, e.g., McCottrell v. EEOC*, 726 F.2d 350, 351 (7th Cir. 1984); *Ward v. EEOC*, 719 F.2d 311, 313 (9th Cir. 1983), *cert. denied*, 466 U.S. 953 (1984); *Francis-Sobel v. University of Me.*, 597 F.2d 15, 17-18 (1st Cir.), *cert. denied*, 444 U.S. 949 (1979); *Georator Corp. v. EEOC*,

---

[2]EEOC had been neither named as a party in Plaintiff's initial, pro se pleading nor served with process when it filed its Motion to Dismiss and accompanying brief, which Plaintiff averred she never received. After Plaintiff retained counsel and filed her Amended Complaint adding EEOC as a named defendant, EEOC "reasserted" its Motion to Dismiss but never served the underlying materials on counsel or plaintiff.

592 F.2d 765, 767-69 (4th Cir. 1979); *Gibson v. Missouri Pac. R.R.*, 579 F.2d 890, 891 (5th Cir. 1978), *cert. denied*, 440 U.S. 921 (1979). Following this established line of authority, we hold that Plaintiff's claim for compensatory and punitive damages against EEOC under the cited statutory authority should have been dismissed pursuant to Fed. R. Civ. P. 12(b)(6), as originally argued by EEOC below.

Dismissal of Individual EEOC Defendants

We need not decide here whether and under what circumstances EEOC employees, as opposed to the agency itself, may be subject to suit for damages for improper conduct in connection with the processing of a discrimination charge. The district court noted that Plaintiff's claim in this regard could be dismissed because "Plaintiff has failed to allege any direct or personal involvement on the part of Defendants Kemp and Burris." R. Vol. I, doc. 31 at 3 (Order granting individual EEOC Defendants' Motion to Dismiss). Indeed, although these Defendants are named as parties, not one factual allegation in Plaintiff's First Amended Complaint so much as mentions them. *See* R. Vol. I, doc. 11. All of the allegations regarding misprocessing of Plaintiff's discrimination charge simply attribute such conduct to the agency itself, without further elaboration. *Id.* at 6-8. It was proper for the district court to dismiss the individual EEOC Defendants, as no claim was even facially stated against them.[3]

Summary Judgment for RSC

Plaintiff relied on several legal bases for her action against RSC, all of which were rejected, for various reasons, by the district court. Plaintiff in-

---

[3]We note that Plaintiff never moved to amend her pleadings to supply the particularized factual allegations the district court found lacking in its order dismissing these Defendants.

voked 20 U.S.C. §1681 (prohibiting sex discrimination in federally funded programs) and §1684 (prohibiting discrimination on account of blindness or visual impairment in federally funded programs) without any further elaboration in her Amended Complaint. In its Motion for Summary Judgment, RSC argued that Plaintiff could not establish a prima facie case of sex discrimination under §1681, which incorporates the same elements of proof required in Title VII cases, *see Mabry v. State Bd. of Community Colleges & Occupational Educ.*, 813 F.2d 311, 316-18 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987), because the position denied Plaintiff was filled by another woman.[4] *See Risher v. Aldridge*, 889 F.2d 592, 596 n.11 (5th Cir. 1989) (prima facie case for sex discrimination in hiring); *see also Breneman v. Kennecott Corp.*, 799 F.2d 470, 474 (9th Cir. 1986) (discriminatory discharge); *Namenwirth v. Board of Regents*, 769 F.2d 1235, 1240 (7th Cir. 1985) (discriminatory denial of tenure), *cert. denied*, 474 U.S. 1061 (1986). RSC contended that §1684 "is not applicable to the instant case since the Plaintiff is neither blind nor suffering from severely impaired vision and makes no allegations of such." R. Vol. II at 13. The district court granted RSC's motion as to these sections because Plaintiff wholly failed to substantiate her position in response to the arguments outlined above. Plaintiff has likewise, on appeal, neglected to address directly either the district court's ruling or the merits of RSC's arguments. We affirm the district court on these matters.

The district court concluded that Plaintiff's reliance on 42 U.S.C. §1981 and §1982 to redress conduct that occurred some four and a half years prior to suit was precluded by the two-year statute of limitations applicable to personal injury suits in Oklahoma. *See*

---

[4] We also note that Plaintiff's Amended Complaint is devoid of any factual allegation of sex discrimination.

Okla. Stat. tit. 12, §95 (Third). *See generally Meade v. Grubbs*, 841 F.2d at 1524. The Supreme Court has held that the forum state's statute of limitations for personal injury actions provides the appropriate limitations period for civil rights claims under §1981, *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-62 (1987), as well as 42 U.S.C. §1983, *Wilson v. Garcia*, 471 U.S. 261, 276-80 (1985), but the Court has not yet addressed the issue in connection with §1982. However, we agree with the district court that the same basic considerations underlying the holdings in *Goodman* and *Wilson* apply with respect to Plaintiff's §1982 claim and, therefore, that section 95 (Third) barred its assertion as well.[5] *See Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1528 (7th Cir. 1990) (authority for application of state personal injury statute of limitations to §1982 suit (a point parties stipulated to) could be derived by combining *Wilson* holding regarding §1983 with prior circuit precedent that §1982 and §1983 should be treated the same for limitations purposes); *Rodriguez v. Village of Island Park, Inc.*, No. CV-89-2676, 1991 U.S. Dist. LEXIS 9469, at *13-14 (E.D.N.Y. July 2, 1991) (post-*Wilson* and *Goodman* decision holding that §1982 is sufficiently analogous to §1981 and §1983 to warrant use of the same limitations period); *see*

---

[5] Although Plaintiff's cause of action accrued prior to *Goodman*, we see no retroactivity problem in applying section 95 (Third) to Plaintiff's claims under §1981 and §1982. A year before the events involved here, this court presaged *Goodman* by applying section 95 (Third) to a §1981 claim in an action arising out of Oklahoma. *See EEOC v. Gaddis*, 733 F.2d 1373, 1377 (10th Cir. 1984). While we have no comparable §1982 decision, given our holdings in *Gaddis* and *Abbitt v. Franklin*, 731 F.2d 661, 662-63 (10th Cir. 1984) (applying section 95 (Third) to §1983 claim in accordance with *Garcia v. Wilson*, 731 F.2d 640 (10th Cir. 1984), *aff'd*, 471 U.S. 261 (1985)), application of section 95 (Third) to Plaintiff's §1982 claim is simply a logical extension of precedent predating accrual of the cause of action asserted here. Under the circumstances, reliance on a statute of limitations other than section 95 would have been unfounded, and a limited, prospective application of our decision in this regard is not warranted. *See generally Budinich v. Becton Dickinson & Co.*, 807 F.2d 155, 157-58 (10th Cir. 1986), *aff'd*, 486 U.S. 196 (1988).

also Allen v. Gifford, 462 F.2d 615, 615 (4th Cir.) (pre-*Wilson* decision holding that §1982 should be governed by same statute of limitations applicable to §1983), *cert. denied*, 409 U.S. 876 (1972); *Waters v. Wisconsin Steel Works of Int'l Harvester Co.*, 427 F.2d 476, 488 (7th Cir.) (pre-*Goodman* decision holding that §1982 should be governed by same statute of limitations applicable to §1981), *cert. denied*, 400 U.S. 911 (1970); *cf. Callwood v. Questel*, 883 F.2d 272, 274 (3d Cir. 1989) (personal injury statute of limitations applied to §1985 claim in light of *Wilson* and *Goodman*).

Finally, the district court dismissed Plaintiff's Title VII claim of race discrimination as untimely filed under 42 U.S.C. §2000e-5(f)(1). The district court recognized that this nonjurisdictional limitations period is subject to equitable tolling, *see Gonzalez-Aller Balseyro v. GTE Lenkurt, Inc.*, 702 F.2d 857, 859 (10th Cir. 1983) (Supreme Court's holding regarding nonjurisdictional status of requirement that charge be timely filed with EEOC, *see Zipes v. Transworld Airlines, Inc.*, 455 U.S. 385, 393 (1982), is equally applicable to §2000e-5(f)(1) requirement that suit be timely filed in federal court), but concluded that the circumstances did not warrant such relief. *See* R. Vol. I, doc. 50 at 5-8, 10-12. We agree. "[I]n this circuit, a Title VII time limit will be tolled *only* if there has been 'active deception' " of the claimant regarding procedural prerequisites. *Johnson v. United States Postal Serv.*, 861 F.2d 1475, 1481 (10th Cir. 1988), *cert. denied*, 110 S. Ct. 54 (1989). The EEOC's September 29, 1989, "Determination" unequivocally advised Plaintiff that, absent a request for review made by October 13, 1989, the existing determination would become final and her right to sue would expire on January 12, 1990. *See* R. Vol. II, Exhibit 9. The EEOC repeated the same admonition in its January 5, 1990, rejection of Plaintiff's untimely request for review. *See* R. Vol. II, Exhibit 10. While Plaintiff evidently relied to her

detriment upon her belated, and therefore ineffective, request for review, this "was not due to a false representation by any court, agency, or putative defendant." *Johnson*, 861 F.2d at 1481. Moreover, the EEOC documents involved here exhibit none of the misleading ambiguity we deemed sufficient to warrant equitable tolling in *Martinez v. Orr*, 738 F.2d 1107, 1111-12 (10th Cir. 1984). On the contrary, the mandatory nature of both the January 12, 1990, deadline and the time limitation on the only exception thereto was made abundantly clear by EEOC.

For the reasons discussed above, we AFFIRM the judgment of the United States District Court for the Western District of Oklahoma in favor of all Defendants.

APPENDIX C

42 §2000e-5

Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this

section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

Appeals

(j) Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

Appendix D

DEPOSITION OF DR. W.M. SCHEERER
OCTOBER 3, 1990

Dr. Scheerer, to make sure we're clear, the copies I have shown you of those last two documents, J and I, also have a received stamp by Rose State College on them.

When you have identified these as being copies, I think we understand that you mean your copy did not have the Rose State stamp on it; is that correct?

A. That's correct. I sent them a photocopy.

Q. Well, I didn't want there to be any confusion about that.

Dr. Scheerer, I'm showing you a document marked Defendant's Exhibit K. Would you please identify that?

A. This is a letter from EEOC, Determination.

Q. Did you receive a copy of this, Dr. Scheerer?

A. I don't remember receiving this. What is the date on this?

Q. September 29th, 1989.

A. Oh, yes, I do.

Q. You did receive a copy of this?

A. Uh-huh.

Q. Do you recall when you received it, Dr. Scheerer?

A. I received it shortly after that date, and I responded to the Washington office.

Q. You received it shortly after September 29th?

A. Right. I responded on this — I responded — I think this is the one. I responded on the bottom of the letter that I got from Washington.

Q. What letter to Washington? You mean, you responded on the bottom of your copy of this determination document?

A. I responded to this on a letter that he sent me. This wasn't the one.

Q. What letter was that, Dr. Scheerer?

A. It was a letter stating that he — how they had appointed someone or something. Burris sent the letter. And I — not Burris. The lady from Dallas sent me a letter.

Q. That letter that you're referring to, is that any of the letters that we've looked at today?

A. Do we have a letter? I saw a letter from that lady in Dallas.

Anyway, I wrote —

MS. BLANKENSHIP: Let's go off the record just a minute.

(Discussion off the record)

Q. (By Ms. Blankenship) Dr. Scheerer, do you have with you today a copy of the letter you responded to, a copy of the letter from the EEOC with your response written on it?

A. No, I don't have it with me. I thought I saw that here. I guess I didn't.

Q. You did not bring that with you today?

A. No, I didn't. But I can — I'll find it.

Q. Would you be willing to furnish that to me, please?

A. Sure.

Q. Do you recall whether you wrote that letter before or after you received this determination letter?

A. It was after the determination.

Q. Did you receive the letter from the EEOC before or after you received the determination letter?

So we're not confused, as I understand it, you received a letter from the EEOC –

A. In Washington.

Q. – in Washington. After that you received this determination document; is that correct?

A. I received a determination document I rejected. And I thought I saw that here.

MR. DAVIS: What are we on now?

MS. BLANKENSHIP: I'm trying to clarify this letter that she says that she sent but she said she did not bring it with her.

THE WITNESS: The one that I wrote on the bottom of. I wrote that on the bottom of a Burris letter, wasn't it? I think it was. On the bottom of a Burris letter, because he gave me so many days to respond.

MR. DAVIS: Dr. Scheerer, you must understand that Ms. Blankenship does not represent EEOC and she may not have Mr. Burris' file or copies of his letter.

She represents Rose State College. As such, she has quite an extensive file of EEOC, but not all of their file.

THE WITNESS: Oh, I see.

Q. (By Ms. Blankenship) Dr. Scheerer, would you be willing to furnish me a copy of the letter from the EEOC with your response?

A. Sure.

Q. But to the best of your recollection, you responded – or your letter back to the EEOC was after you had received the determination letter?

A. Uh-huh.

Q. Do you recall the substance of the letter?

A. See, he gave me – I was given –

Q. Wait just a minute, Dr. Scheerer. Let me show you another document here. This may clear up the confusion.

I'm showing you a document marked Defendant's Exhibit L. Would you identify that, please?

A. This is a letter from Jacqueline Bradley, from the Dallas office, EEOC.

MR. DAVIS: Now, this was before all of the other things.

THE WITNESS: Yes, this was before that.

Q. (By Ms. Blankenship) Is this the letter you're talking about that you wrote your response on?

A. No. There's another one.

MR. DAVIS: Burris sent her a letter actually about six days before the letter was dated from Washington.

In Burris' letter he did essentially the same thing as the National Director's letter did.

She responded upon – I'm using the word correctly – upon Burris' letter. Without directing a separate response to the Washington office, she simply made her response upon the letter that she had received from Burris.

MS. BLANKENSHIP: May I have a copy of that letter?

MR. DAVIS: I'm going to get you a copy of it. You know I am. I'm going to be talking about it. Okay?

Q. (By Ms. Blankenship) Do you recall the date of that letter, Dr. Scheerer?

A. It's a few days after his date. Because when I got it, I responded straight away and sent it to Washington.

Q. Are we talking about August or September?

A. September.

Q. But it was before you received this determination letter?

A. No, it was – You see, after I received this –

MR. DAVIS: Doctor, if you're not sure –

THE WITNESS: I'm not sure.

Q. (By Ms. Blankenship) I'm calling it the determination letter, because that's what it's marked.

A. I'm not sure, but I'll get a copy of that.

MR. DAVIS: Counsel, I frankly do have a copy of that letter. And I will send you a copy of it, along with this other material.

And if you will allow me to interject this, Director Burris' letter, who was the Regional Director, is dated the 18th of September.

The Director of EEOC out of Washington, his letter is dated the 24th. I haven't the slightest idea when they were received.

But I do know that she made her response on the bottom of and upon Director Burris' letter.

MS. BLANKENSHIP: Is it dated; do you recall?

MR. DAVIS: Her response?

MS. BLANKENSHIP: Uh-huh.

MR. DAVIS: No, it's not dated. It's on the bottom, it's at the end and upon that letter.

Q. (By Ms. Blankenship) Do you recall, then, Dr. Scheerer, regardless of the date that counsel is talk-

ing about, do you recall whether you wrote your response after you had received this determination letter or before?

A. I don't remember the sequence. We have to see the date on his letter. And I gave my response, not to him, but to Washington on his letter.

Q. "His" being Mr. Burris?

A. Uh-huh.

Q. And Mr. Burris is from where? Washington or —

A. Here.

Q. Do you recall receiving that letter before you received the determination letter?

A. I don't remember that. You see, during this time, I was — I had protested them setting it aside, because they said — they were saying what Rose State had said. Rose State told Burris that it wasn't in his jurisdiction, and that's why he sent this and —

See, all of this was in response to my continued inquiry as to why.

Q. Do you recall what you said in that letter to Mr. Burris, the one you hand-wrote?

A. I didn't hand-write it. It's typed.

Q. You typed it at the bottom?

at the other day, and I will show you the copy again, this is the letter dated December [sic] 24th. And on the second page, in the second paragraph, would you look at the address there, please.

A. I don't have this. I have told you before, I don't have this, this determination letter. I never did get this.

Q. Are you now saying you have never seen this determination letter?

A. Not until in here. If you will recall, when I was explaining about my response — and I explained about my response on the bottom of the letter. That's why I knew this wasn't the letter.

I didn't never get this.

MS. BLANKENSHIP: Let's break for just a minute.

(Short break)

Q. (By Ms. Blankenship) Dr. Scheerer, we are still talking about what was marked previously as Defendants' Exhibit K, titled, for purposes of talking about it, A Determination Letter. Do you have that in front of you?

A. I have it in front of me.

Q. Dr. Scheerer, it is your testimony today that you never saw that letter until the deposition last week?

A. Right.

Q. Dr. Scheerer, do you recall telling me last week that you did recall seeing this letter?

A. Yes. I told you I didn't have that. And if you will find in your note —

MR. DAVIS: Just answer the question. If you have answered it, let's move on. She has a right to ask you questions.

THE WITNESS: I was just going to –

MR. DAVIS: That's all right. Just answer the question.

Q. (By Ms. Blankenship) Dr. Scheerer, I don't want there to be any misunderstanding. Is it your testimony today that you never saw that determination letter, marked Exhibit K, until last week at this deposition?

A. That's right, when you mentioned about it. I was trying to explain about, that I had wrote on the bottom of the letter. And in looking at this, I couldn't have, because it was not enough space, remember? And then you –

MR. DAVIS: Talk for the record, Dr. Scheerer. Go ahead.

THE WITNESS: Well, I explained that I had responded on the bottom of his letter, which was the 18th.

Q. (By Ms. Blankenship) Dr. Scheerer, I would like to show you – I am going to put this back in here so it doesn't get lost – one of the other documents you showed me, or your counsel sent me, titled, "Rejection of Untimely Request for Review, Title VII." Do you have that in front of you, please?

A. Yes.

Q. That's marked Defendants' Exhibit V; right?

A. If that's a V.

Q. That is a V.

Would you identify that for us, please?

A. It's a letter from EEOC, dated January 5th, out of Washington, D.C.

Q. Dr. Scheerer, would you read the first line of that document, please.

A. "Rejection of Untimely Request for Review."

Q. The first line of the next paragraph.

A. "The commission has received your request for review . . ."

Q. Would you please tell me what request for review they are talking about?

A. I don't know what they're talking about. I asked for a request here. (Indicating)